DOCUMENT RESUME

ED 444 321 EC 308 012

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TITLE The Role of Attorneys in Special Education Mediation. Briefing Paper.
INSTITUTION Consortium for Appropriate Dispute Resolution in Special Education (CADRE), Eugene, OR.
SPONS AGENCY Special Education Programs (ED/OSERS), Washington, DC.
PUB DATE 2000-07-00
NOTE 39p.
CONTRACT H326D98002
AVAILABLE FROM CADRE, Direction Service, P.O. Box 51360, Eugene, OR 97405-0906. Tel: 541-686-5060; Fax: 541-686-5063; e-mail: cadre@directionservice.org; Web site: http://www.directionservice.org/cadre.
PUB TYPE Opinion Papers (120)
EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Arbitration; *Child Advocacy; *Conflict Resolution; *Disabilities; Educational Practices; Elementary Secondary Education; *Lawyers; *Special Education

ABSTRACT

This briefing paper examines the role of attorneys, and to a lesser extent advocates, in special education mediation. It attempts to "mediate" the debate by adopting the structure of mediation. It begins with a background chapter offering a historical basis for conflict resolution in special education. It then examines the positions held by both proponents and opponents of permitting attorneys and advocates to participate in special education mediation. These positions include, for proponents, the ability of attorneys and advocates to overcome power imbalances, provide a valuable viewpoint, and facilitate settlement and, for opponents, the possibility that attorneys and advocates may undermine collaboration by using adversarial approaches. It then considers the interests and concerns shared by advocates of the two opposing views. These include that each side should enter mediation capable of understanding and representing its rights and interests and that mediation should foster a fair, candid, and respectful dialogue during the incipient stages of a dispute. Examples of innovative practices in various states are offered. Finally, the paper concludes with practical recommendations that attempt to satisfy these common interests. Three appendices provide federal legal documentation. (Contains approximately 100 references.) (DB)

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Consortium for Appropriate Dispute Resolution in Special Education

The Role of Attorneys in Special Education Mediation

A briefing paper for
*THE CONSORTIUM FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUCATION (**CADRE**)*

EDWARD FEINBERG, PH.D.
JONATHAN BEYER, J.D.

July 2000

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CADRE is a project of

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CADRE is funded by

ACKNOWLEDGMENTS

The authors gratefully acknowledge the assistance of the following individuals who generously gave of their time through interviews that were in person, by telephone, or through electronic correspondence:

Greg Abell, Director of Sound Options, Inc. of Bainbridge, Washington

Lyn Beekman, attorney and mediator in Okemos, Michigan

Jody Bonilla, parent in Carriere, Mississippi

Barb Breen, parent and advocate with the Eau Claire Area School District in Eau Claire, Wisconsin

Matthew Cohen, attorney in private practice and President of Children with Attention Deficit Disorders (CHADD) in Chicago, Illinois

Grace D'Alo, Director of Special Education Mediation Services for the Pennsylvania Department of Education

Curtis Decker, President of the National Association of Protection and Advocacy Systems, Inc.

Kathryn Dobel, attorney in private practice in Berkeley, California

Anne McDonald Fox, law student and intern with the Pennsylvania Department of Education

Pam Goins, Director of Mediation for the Kentucky Department of Education

Suzy Harris, Legal Specialist at the Oregon Department of Education

Tim Harris, Montana Office of Public Education

Dena Hook, Statewide Parent Training Coordinator for the Ohio Coalition for the Education of Children with Disabilities (OCECD)

Stacey Holloway, principal in the Oldring Consulting Group of White Rock, British Columbia, Canada

Peter Maida, Director of the Key Bridge Foundation in Washington, DC

Myrna Mandlawitz, attorney and lobbyist in Washington, DC

Reed Martin, attorney in Houston, Texas

Irene Martinez, Director of Fiesta Educativa of California

Deborah Mattison, attorney in private practice and parent advocate in Birmingham, Alabama

Sandra McQuain, Coordinator of Due Process and Mediation for the West Virginia Department of Education

Sam Neustadt, Director of Mediation for the California Department of Education

Michael Opuda, Due Process Coordinator for the Maine Department of Education

Michelle Powers, Director of Mediation for the South Dakota Department of Education

Ruth Ann Rasbold, parent and advocate with the Federation for Children's Mental Health in Boston, Massachusetts

Gary Reusch, attorney in private practice in Milwaukee, Wisconsin

P.J. Ford Slack, Director of Special Education for the Alaska Department of Education

Eva Soeka, Professor of Law at Marquette University in Milwaukee, Wisconsin

Larry Streeter, Dispute Resolution Specialist for the Idaho Department of Education

Valerie Vanaman, attorney in private practice in Sherman Oaks, California

Elizabeth Williams, attorney and Director of the Conflict Resolution Center at the Georgetown University Child Development Center in Washington, DC

Peter Wright, attorney and founder of Wrightslaw.com which runs a listserv on special education topics in Virginia

Ellen Yamshon, mediator and law student in California

Special thanks to Jim Melamed and Philip Moses of CADRE, Daphne Worsham of the Western Regional Resource Center in Eugene, Oregon and to CADRE's Project Officer, Peggy Cvach, for her thoughtful review and comments. Thanks also to Anne Warren Smith for her editorial assistance, Tom Kelly of Cappelli, Miles, Wiltz Kelly for design and layout, and to Aimee Taylor and Jess Hart for their administrative support. Finally, the authors are extremely appreciative for the ongoing encouragement and support of Marshall Peter, Director of CADRE.

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This briefing paper examines the role of attorneys and, to a lesser extent, advocates in special education mediation. Rather than using conventional analysis to answer the question of what role attorneys and advocates should play in special education mediation, this paper "mediates" the debate by adopting the structure of mediation. First, it examines the positions held by both proponents and opponents of permitting attorneys and advocates to participate in special education mediation. It then considers the interests and concerns shared by advocates of the two opposing views. Finally, the paper concludes with practical recommendations that attempt to satisfy these common interests.

BACKGROUND

Historical Basis: Conflict in Special Education

The Education of All Handicapped Children Act (known as EHA or P.L. 94-142) and its successor, the Individuals with Disabilities Education Act (known as IDEA and, in its most recent form, IDEA 97) have been hailed as landmark legislation of the past quarter century for children with special needs in the United States.[1] The law that grants children with disabilities a federal entitlement to a "free appropriate public education" (FAPE) replaced a patchwork of uneven services that rarely met the needs of these children.[2] The previously haphazard way in which children were deemed to have a disability or placed in special classes has been transformed by regulations that require adherence by every school district to federally mandated policies and procedures. EHA and IDEA emphasize the importance of parents as members of the school-based team that is empowered to make decisions regarding the educational needs and services for children with disabilities. The framers of the law recognized that there would be occasional disputes between parents and school personnel regarding such issues as eligibility for special education, those services needed to meet educational goals and objectives, the frequency with which particular services should be delivered, the degree to which children could be educated with nondisabled peers, and the sometimes elusive nature of what may be considered to be within the scope of the special education entitlement. In anticipation of the likelihood of such disagreements, EHA and then IDEA set forth procedures which include administrative due process hearings that were designed to resolve disputes between school districts and parents.

Due process hearings are formal, quasi-legal forums in which the two parties to a dispute (generally the school district and the parents) present arguments and evidence to a hearing officer. The hearing officer, serving in a role similar to an administrative law judge, makes a determination of legal rights and responsibilities. Generally well versed in special education law, the hearing officer renders a decision based on interpretations of federal and state regulations as well as precedents established through due process or court decisions from other districts. Decisions may be based on substantive issues as well as on violations of various procedural safeguards, such as notifications of meetings to parents or ensuring that meetings were held within a specified number of days.[3] Appendix A contains the procedural safeguards for IDEA. Parties who do not prevail in hearings may seek redress in federal district and then appellate courts. Several cases regarding interpretations of EHA and IDEA have reached the Supreme Court (Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176 (1982); School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359 (1985); Florence County School Dist. Four v. Shannon Carter, 510 U.S.7 (1993). The growth of case law, regulatory interpretations through policy letters from the Office of Special Education Programs (OSEP), and advancing knowledge related to interventions for persons with disabilities have made arguments in due process hearings ever more complex. Parties are often represented by attorneys who specialize in the arcane area of special education law. Parties frequently hire experts to testify in support of particular

perspectives. Hearings have become time consuming, expensive, and adversarial. One state, for example, reports that the average due process hearing costs school districts $40,000.[4] Crowley, Smith, and David reported figures as high as $30,000 in 1991 dollars[5] and Zirkel reports on a Pennsylvania hearing that had 19 sessions during a two-year period in which the cost of the transcript alone was $27,000.[6] Critics argue that IDEA now guarantees an elaborate review process rather than any meaningful entitlement to special education services.[7] Parents report that the rigidity and conflictual nature of hearings have a negative long-term impact on the relations between families and personnel associated with school districts.[8] One writer went so far to describe hearings as "stressful, even traumatic," for many disputants.[9]

Mediation as a Form of Conflict Resolution

A variety of alternative forms of dispute resolution have been proposed over the years to deal with educational conflicts. Mediation has been the most frequently recommended process.[10] Most states began to offer mediation during the 1980s, and, in 1994, Ahearn reported that 39 of the 50 states were operating special education mediation systems.[11] Research indicates a sustained interest in special education mediation at the state level.[12] However, the only mention of mediation in federal regulations prior to IDEA 97 was found in the 1990 regulations in a note to the regulation governing impartial due process hearings. That note indicated, "However, the only mention of mediation in federal regulations prior to IDEA 97 was found in the 1990 regulations in a note to the regulation governing impartial due process hearings. That note indicated, "Many states have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children." (34 CFR § 300.506, cmt.) (October 30,1990)

The 1997 reauthorization of IDEA is the first time that mediation is explicitly addressed as a preferred mechanism for conflict resolution in special education. Gittler and Hurth write that the "legislative history of IDEA 97 manifests a clear congressional intent that mediation become the primary, albeit not the exclusive, process for resolving disputes arising under IDEA."[13] Appendix B provides an excerpt from the House Committee that examined mediation as part of the reauthorization of IDEA. Appendix C provides the regulatory provision for mediation under IDEA 97. The regulations specify the following (34 CFR § 300.506) (March 12,1999):

- State and local education agencies must offer a mediation process whenever a due process hearing is requested.
- Mediation must be voluntary on the part of the parties.
- State and local education agencies cannot use mediation to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under Part B of the Act.
- States are obligated to bear all costs associated with the mediation process.
- Mediation must be conducted by a qualified and impartial mediator who is trained in effective mediation techniques.
- States may require that a disinterested party explain the benefits of mediation to parents who choose to decline this form of dispute resolution.
- Mediations are considered private, confidential proceedings designed to facilitate open exchanges of information, and are not to be used as a tool for discovery should parties eventually go to administrative hearings.

General Characteristics of Mediation

Mediation is used in a variety of settings.[14] In fact, the 1990s have witnessed a veritable explosion in the use of this form of conflict resolution. Currie notes that it has become an increasingly utilized form of dispute resolution in medical malpractice and child custody.[15] McEwen, Rogers, and Maiman write that mediation has become the dominant form of dispute resolution in divorces.[16] Annette Townley, former Executive Director of the National Association of Mediation in Education (NAME, now CRENet) estimated that more than 5,000 schools nationwide offer some kind of conflict resolution program.[17] Mediation is utilized in such school-related disputes as disciplinary problems, peer arguments, parent and teacher conflicts, and teacher-administrator problems.[18] It is also used by teachers' unions and school systems as a bargaining tool.[19] Sabatino reports that "the range of disputes now subject to statutory or court-annexed ADR programs is mind-boggling."[20] In whatever setting mediation is conducted, there are basic definitions of the process. Baldridge and Doty note that "mediators are third parties, not otherwise involved in a controversy, who assist disputing parties in their negotiations...the mediator does not issue a decision that parties must obey. Any party may choose not to settle and may pursue other remedies."[21] Engiles, et al[22] note that mediation:

- is a voluntary process in which the primary parties must be willing to meet and discuss their concerns in order to negotiate a mutually satisfactory agreement
- provides an opportunity and structure for the participants to have a full discussion of issues and to work collaboratively to create solutions
- is an empowering process in which the parties are the decision makers and explore issues and design solutions
- is a process for mutual problem solving and not for assigning blame or determining fault
- guarantees confidentiality to all parties
- emphasizes communication and creative problem solving with the mediator present to help the parties define the problem, explore each other's interests, and work together to develop a solution, plan of action, or agreement
- is future-oriented (i.e., describes what future interactions, plans, agreements, or behavior changes will occur).

Boundy and Antonucci compare the mediation and hearing process:[23]

Mediation	*Due process hearings*
Informal process	**Formal legal proceeding**
Parents can speak for themselves	**Attorneys or advocates speak for the parents**
Settlement is voluntary	**Hearing officer imposes a decision on the parties**
Parties shape their own agreement: Flexible, creative, custom fit solutions result	Hearing officer imposes a decision based on his or her determination of the facts
Cooperative problem solving between the parties is encouraged	**Tension and hostility between the parties may be increased**
Lasts approximately 2-4 hours	Lasts approximately 1-3 days
Discussion allows participants to focus on planning the student's educational plan together	**Evidence and testimony are presented as the basis for a decision about the future student's educational plan**

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The Growing Controversy

While mediation has received praise from parents[24] and school district administrators[25] there are unanswered questions about this increasingly popular form of dispute resolution. Concerns include the fear that mediation may be employed when issues of law need to be decided;[26] that emphasis on the development of a collegial relationship among families and school districts could be achieved at the expense of advocating for the interests of the child;[27] that there is a lack of national standards for training and a vagueness in state-specific standards of certification;[28] and, the uncertainty in the mediator's role. Some commentators express concern that all participants may not approach mediation with a commitment to collegiality and a nonadversarial mindset. There are school district officials who contend that overly zealous advocacy by attorneys on behalf of their clients can undermine the collaborative, consensus-building nature of mediation. Examples are cited of situations in which the litigious atmosphere that frequently pervades hearings has been reproduced in mediation.The role of attorneys and advocates in special education mediation is controversial. Proponents of attorney participation argue that there is an imbalance of power between school districts and families if parents are not represented during sessions. Opponents of attorney participation look to the mediator to ensure a balance of power and contend that lawyers bring a culture of contention to mediation and undermine the collaborative nature of the process. In approaching this issue, some states have offered training on collaborative problem solving for all stakeholders in the mediation process to encourage collegial decision making. Other states have published expectations for the behavior of all participants as they prepare to approach mediation. Still other states have simply excluded or are contemplating the exclusion of attorneys from the mediation process. The role of the attorney in mediation is also being debated within the legal community. A plethora of questions are being posed: How does an attorney effectively define and advocate for the interests of her client within the mediation setting?[29] Can the imperative of collegiality hinder the pursuit of justice? Does a "successful"[30] mediation mean that it was necessarily "fair" to the child?[31] Mediation promises significant benefits over the inequities and inefficiencies of due process for all members of the special education community. Nevertheless, stakeholders in special education raise important questions concerning the particular role attorneys should play in the mediation of special education disputes.

POSITION I: IN FAVOR OF ACTIVE PARTICIPATION OF ATTORNEYS

Proponents of an active role for attorneys and advocates in special education mediation present two central arguments to support their position. First, they assert that attorneys and advocates can overcome the inherent power imbalances between school district personnel and parents in special education mediation. Second, they contend that attorneys and advocates are important stakeholders in resolving special education disputes, providing a valuable point of view, and often facilitating settlement.

Attorneys and Advocates Can Overcome the Power Imbalances.

Critics of resolving special education disputes through mediation argue that there is often an imbalance of power between representatives of school districts and families who participate in mediation.. Examples of power imbalances include lack of information by parents on the full scope of what children may be entitled to under IDEA; the use of jargon by school officials that, despite attempts at explanation, can remain obscure and even incomprehensible for parents; lack of parental experience in participating in such a setting; cultural differences between families and school officials; differences in negotiating skill and experience; and fear by parents that perpetuation of conflict could hamper future relationships with the school district.

Advocates of this position maintain that the tactics used in mediation by school officials can overwhelm parents. School officials may be reluctant to provide the services that parents request due to the precedential impact of providing new or expanded services to a particular child. Members of the school system are seen as defenders of the status quo and protectors of the resources that have been budgeted for the year. They may attempt to discredit the parents' request by contending that research doesn't support different outcomes for a child when the desired service is delivered or they may cite anecdotal evidence for the lack of efficacy of the service. Unless the parent is also a professional in the field or is familiar with the literature, it is difficult to pose effective counter arguments. An attorney or advocate may be helpful because of his or her awareness of literature that supports the parents' position or because he or she can take issue with the school system's position by citing judicial decisions or standards in other districts that support the parent's request.

Parents without representation may unintentionally use language during a mediation that undermines their positions. For example, a parent may be asked by a mediator to explain what she would like for her child. Many parents reply by stating that they just want what is best. The school district representative may respond by saying that the system recognizes that the parent would like what is best but that they are obligated, under IDEA, to provide only what is appropriate. The parent is probably unaware of the fine legal distinction between services that are "optimal" versus those that are "appropriate", however, the school representative could use the parent's statement as evidence that the parental request exceeds the scope of FAPE. A parent who is represented by an attorney or advocate would probably be counseled about which words to use when explaining what services are desired for the child.

A Chicago attorney and current President of Children with Attention Deficit Disorder (CHADD) expresses views representative of attorneys who assist parents in mediation. He writes that, "Schools generally have greater control over information about the child, the options available, and the law so they are in the dominant position in mediation to start with. Many parents may agree to things in mediation because they don't know any better and get a raw deal. Having counsel available for parents levels the playing field to a significant degree, especially if the attorney is experienced in special education law."[32] An experienced California attorney adds that, "Parents generally do not understand how to formulate the issues or present the case on behalf of their own child."[33] The Executive Director of the National Association of Protection and Advocacy Systems notes that even attorneys who are parents of children with disabilities often are represented during mediations because it can be difficult to disentangle their perspective on the needs of their child with their understanding of the parameters of the law.[34] Maine's Due Process Coordinator, Mike Opuda, conducted a study focusing on parental satisfaction with the state's complaint and due process system.[35] The theme of parental powerlessness in the face of the system's legal expertise and resources was an issue frequently noted by parents. Kuriloff and Goldberg's study of the New Jersey mediation system concluded that, "Parents with attorneys or advocates found the mediation process fairer than those with...no representation at all."[36]

The literature generally supports the position that parents should have access to counsel because of a power imbalance with the school system. Gittler and Hurth note that power imbalance can lead to an "inequitable mediated settlement."[37] Schrag agrees, writing that "parents are accustomed to following the guidance and expertise of educators, and may be uncomfortable questioning educators."[38] The clash of perspectives between schools and parents can add to the challenge of collaborative decision making according to Mnookin[39] and Engel.[40] Mastrofski writes that school systems can have an overwhelming and formidable presence in a mediation session because of the expertise they possess on the nature of entitlements and how services are determined.[41] Power imbalance can be exacerbated through cultural and socioeconomic status differences between parents and school.[42]
The National Council on Disability acknowledges that:

Children with disabilities and their families who are non-English speaking, or who live in low-income, ethnic or racial minority, and rural communities, are frequently not represented players in the process. These individuals must be included and given the information and resources they need to contribute and advocate for themselves.[12]

Fiesta Educativa of California provides training and advocacy for Latino families in which a family member has a disability. While the organization does not have an official position on the participation of attorneys in special education mediation, its director explains that, "The presence of attorneys in mediation raises the stakes. The level and intricacy of the process is more technical, more complex. Sometimes parents need this kind of support in mediations. The attorney or advocate elevates the power of the parents."[13] She relates that many Latino families are unfamiliar with due process and suffer from power imbalances. "They generally come from cultures in which authority figures have significant influence. Without representation, it is unlikely that they would have the skills or mindset to challenge authority. The advocate enhances parental authority both in the mind of the parent and in the mind of the school district. They know that they will have to deal differently with represented and unrepresented parents." The Director of Special Education for Alaska often calls on tribal elders in remote Alaska villages to accompany families to mediation since the tacit support of the elder enhances the comfort of families in challenging educational authority.[14] A spokesperson in the Montana Office of Public Instruction also notes the discomfort some Native American parents feel when challenging school districts.[15]

An attorney and parent advocate from Alabama is particularly concerned about the difficulties that parents with limited education can encounter in mediations. She says that "most parents don't know what to ask for in a mediation and need an advocate to assist them."[16] She gives an example of her request for compensatory education when she believed that an appropriate education has not been forthcoming from a district. "If a parent doesn't know that such a thing exists, how could they advocate for it?" She relates that better educated people are more likely to seek representation in mediation because they are more accustomed to accessing legal assistance. She laments that these are the people who need representation the least. Poor people, possibly intimidated by both the legal system and the educational system, are unlikely to have the resources or the inclination to seek representation. Maine's Due Process Coordinator writes, "Many marginalized parents have not had positive school experiences, resulting in limited education and lower incomes. These parents feel very inadequate challenging the expert opinions of schools. . . We see the majority of cases filed by parents in the upper strata of the culture."[17]

The Alabama attorney also raises the point that attorneys are advocates for the child. Sometimes the educational profile of the child may not be fully understood by the parents. She points out that an attorney with knowledge of special education can review testing materials and the Individual Education Program (IEP) to determine if the needs of the child are being met. A parent may be able to be convinced by a school district that a program that happens to be offered by the school is suitable for the child but the needs of the child may not be truly recognized by the school system.

Several parents who were interviewed for this project said that they felt overwhelmed by mediation when they were unrepresented but felt that they were accorded greater respect when they had counsel or an advocate accompany them to the forum. Two parents noted that the advocate actually never said anything during the discussion but that there was a greater sense of conciliation by the school district representatives, which they attributed to the presence of the advocate.

Attorneys and Advocates Provide a Valuable Viewpoint and Often Facilitate Settlement.

As mediation has become an increasingly utilized form of dispute resolution, many attorneys have incorporated it into their representation of clients. Some attorneys argue that mediation is simply a variation on the traditional out-of-court settlement process. Gordon writes that mediation facilitates the normal practice of negotiation rather than reducing the need for trials.[49] One benefit of mediation is that it gives structure and deadlines to facilitating the settlement process, providing a significant event around which negotiation can occur. Attorneys provide important legal advice and advocacy in this direct form of negotiation, according to Lande.[50] A number of state and local special education mediation directors note that attorney participation during mediation makes the process more effective than when parents are unrepresented. Several themes emerged from interviews. Lawyers can help families and school districts determine reasonable expectations both of their children's educational achievement as well as the school district's delivery of services. Typical of comments were those of the Legal Specialist at the Oregon Department of Education. She said that parents frequently accept a proposal from a school district if their attorney endorses it while the same proposal may be rejected without the support of counsel. If there is mistrust between the school district and parent, the parent may be suspicious of any recommendation that is made by the school representatives. But parents assume that the attorney is acting in their best interests and can evaluate whether a district's recommendation is reasonable.[51] The president of CHADD writes that, "attorneys can be a reality check for parents. Often parents are caught up in a level of anger that interferes with pragmatism and good outcomes. Attorneys can help moderate this phenomenon."[52]

The Coordinator of Mediation for West Virginia writes that attorneys can assist parents in developing a future orientation. "They assist parents in focusing on the issues that can be resolved rather than dwelling on situations that happened in the past and cannot be changed."[53] Kentucky's Mediation Director argues that attorneys give mediation focus and help move it forward quickly. She recounts several cases in which attorneys were able to defuse tension that had developed between districts and families.[54] Eva Soeka, Professor of Law at Marquette University in Milwaukee, Wisconsin strongly supports the benefits of attorney participation. She emphasizes that lawyers can be trained to appropriately represent their clients while recognizing how to determine when school districts have made reasonable attempts at providing programs that are educationally beneficial to children.[55] An attorney in Madison, Wisconsin echoes this theme. He relates that attorneys can provide objective, unemotional perspectives. They can also offer parents a sense of what the law requires as well as its limitations. They can assist school districts by giving advice to superintendents and school boards that may balk at the high cost of services when these are presented by the Director of Special Education.[56]

There is a trend in some states to limit attorney involvement to the provision of guidance to families prior to mediation, telephone or caucus consultation to families during mediation, and review of the agreement following the mediation. This excludes lawyers from direct participation in the actual deliberations but accords families the opportunity for counsel. Those who find attorneys helpful in the mediation process criticize this policy, arguing that it discounts the importance of the interpersonal dynamics that take place during a mediation session. An attorney who is not actively involved in the deliberation may contend that she could have influenced the outcome of the negotiations and that a better agreement could have been devised. She may then advise her client not to sign the proposed agreement. The Coordinator of Due Process and Mediation in West Virginia recounts the frustration of a mediation in which all parties came to consensus after protracted negotiations. "Days after the mediation agreement was reached at a session in which the attorney was not present, the individual told the parent not to sign the agreement. Without having been present, he was not in a position to know how the issues had been

resolved."[57] This may prove especially true for attorneys for school districts who do not participate in mediation. Without having been privy to the negotiations, school district attorneys may focus on other legal considerations of the district in general and not the specific issues of the mediated case.

Proponents of attorney participation in the mediation process express concern that exclusion of attorneys could marginalize them and lead them to counsel clients against participation in this form of dispute resolution.[58] Mandatory exclusion creates an economic disincentive for attorney involvement. Unless addressed in a mediation agreement, families must generally bear the costs of attorneys' fees. Typically, however, those fees are considerably lower than those incurred in litigation. If lawyers are unable to participate in mediations, they may advise clients to go to due process. This may be especially true for attorneys representing school districts. Federal regulations continue to provide for reimbursement of attorneys' fees for due process hearings in specific situations. Ironically, it may be in the interest of attorneys and families to go to due process in states that exclude lawyers during mediation. For individuals who are committed to the presence of counsel during discussions, this is the only vehicle to ensure active legal representation. It should be noted that such a trend has not occurred in exclusion states at this time but observers mention it as a source of potential future concern.

POSITION II: IN FAVOR OF EXCLUSION OF ATTORNEYS

Proponents of excluding attorneys and advocates from special education mediation offer two key arguments to advance their position. First, they insist that attorneys and advocates can undermine the collaborative process of mediation by approaching it from an adversarial perspective. Second, they assert that attorneys and advocates are not necessary to overcome the power imbalances inherent between school district personnel and parents.

Attorneys and Advocates May Undermine Collaboration by Using Adversarial Approaches.

At least seven states (Alaska, Arkansas, Delaware, Idaho, Maine, New Hampshire, Pennsylvania, Washington) formally exclude or discourage attorneys from participating in mediation.[59] Several other states are considering such a policy. The main reason for exclusion typically acquired through anecdotal evidence, is the belief of key policy makers that attorneys maintain an adversarial posture in mediations. Mediation directors chronicle examples of attorneys who polarize discussions, make unreasonable demands, and promote an atmosphere of tension in deliberations. Participants and observers of this process conclude that such behavior, which has become a regrettable characteristic of due process hearings, is contrary to the goals of mediation.

Even mediation directors who are generally favorable to attorney participation provide examples of lawyers who are known for their aggressive tactics and harsh interpersonal style. Boutique law firms have emerged that focus exclusively on special education issues. *The Washington Post* reported that a law firm in the metropolitan Washington, D.C. area garnered more than $3 million from the District of Columbia and surrounding counties in attorneys' fees.[60] Lawyers in such firms are seen as seizing on what directors perceive as trivial procedural violations by school districts as a mechanism to threaten to take school districts to due process hearings. Mediation may be used as a forum in which the lawyer recounts the school district's failures to provide FAPE rather than as a setting to resolve conflict. The Director of Special Education from the state of Washington recounts a 1995 case in which an attorney behaved in an obstructionist manner and was perceived as undermining the developing consensus in the mediation. Although attorneys had accompanied less than 5% of parents to mediations and the

behavior of this attorney was exceptional, the state chose to exclude attorneys from future mediations. The view that attorneys can be a hindrance to the development of a cordial process and appropriate outcome is shared by mediation directors in such diverse states as Alaska, Idaho, and California and is expressed by some in written policies. The Alaska mediation handbook notes: "It is suggested that attorneys not be present as they add a formality to the setting that is more appropriate for a due process hearing."[61] The Idaho policy includes a statement that, "Since mediation is a nonadversarial process which offers the parties the opportunity to communicate directly with each other, legal representation during a mediation session will be strongly discouraged."[62] The Director of California's mediation system explains that a proposal to limit attorney involvement failed in last year's legislative session. He says that the present system is characterized by strong attorney involvement with often acrimonious relationships between lawyers and school district representatives.[63] Writers such as Spier criticize lawyers for verbal aggressiveness and not recognizing the distinction between mediation and litigation.[64] A mediator and law student in California is one among many observers who ascribe the win/lose style of attorneys to the adversarial orientation that has been traditionally promoted in legal training[65], a training that Jacqueline Nolan-Haley writes encourages lawyers to become "connoisseurs of conflict."[66]

Unproductive communication between representatives of parents and school districts is not limited to attorneys.[67] An advocate from Georgia laments that other advocates sometimes "know only half of the law(s), have no negotiation skills, no functional knowledge of the child's specific disability or needs. They seem to think their job is to be a 'pit bull' and 'attack' the school system in a direct and personal fashion. This negates my credibility, and damages my ability to work with the school. I have to 'clean up' after advocates. . . I think we need some baseline professional standards for those who call themselves 'special education advocates.'"[68]

Mediation practitioners and academics also accuse attorneys of bad faith when they do participate in special education mediation. Although the federal regulations specifically prohibit mediation as a source of discovery (see Appendix C), critics contend that some attorneys use mediation for this purpose. Sternlight writes that attorneys have been known to undermine the mediation process by acquiring information that is later used in a more litigious setting.[69] Opuda writes that some of the parents in his survey concluded that the school representatives used mediation to learn about the arguments that parents would use in due process hearings.[70] A veteran special education attorney and hearing officer noted that, "mediation can be abused by any party where it is used to obtain discovery."[71] Even if not negotiating in bad faith, attorneys who routinely participate in mediation may shift the focus of the process away from their clients. They may make the process too attorney centered, moving the emphasis away from one-on-one discussion between the parties. This is a concern of Lande who maintains that the excessive professionalization of mediation could mean that the parties become dependent on lawyers for managing mediation strategy.[72] The California Mediation Director describes a state system that has moved in that direction. Rather than direct discussion among the parties, he reports that attorneys are the main players in the process. The mediation system is actually a mechanism of caucusing between lawyers and clients. Stakeholders rarely talk with each other directly. There is no direct brainstorming and discussion; most parents retain attorneys throughout the process.[73]

Mediators Have the Ability to Overcome Power Imbalances.

Proponents of excluding attorneys from special education mediation believe that lawyers are not needed to create a balance in power. Rather, they suggest that mediators can protect the equity of the process by playing an active rather than passive role in the discussion. Employing evaluative, as opposed to facilitative, mediation techniques,[74] a special education mediator may interpret jargon, assess risks, and offer recommendations for parents in order to ensure a fair negotiation.[75] An evaluative mediator does not advocate for parents;[76] rather the mediator attempts to create a balanced discussion in which the parties may understand, articulate, and achieve their interests.[77] Employment of evaluative mediators, therefore, obviates the need for attorneys to balance power between families and school districts.[78]

Baldridge and Doty[79] argue that mediators level the playing field and suggest considering exclusion of attorneys for school districts and families in mediation. Gitler and Hurth[80] support the use of certain strategies to overcome power imbalance while acknowledging that the use of such strategies might compromise the mediator's neutrality. Therefore, the best mediators for special education disputes may prove those who possess both facilitative and evaluative skills and are able to manage a process that addresses both the rights and responsibilities of families and school districts and helps to build strong relationships.

Several state mediation directors look to the mediator to play an active role. West Virginia's Director writes that, "The mediator has the discretion to control the mediation process, and if the mediator wants the parties rather than an attorney to speak, he or she could make that decision. It is the mediator's responsibility to make sure an imbalance does not affect the process."[81] The Mediation Director for the South Dakota State Education Agency (SEA) notes that, "Most of our mediators have a pretty firm hand when dealing with attorneys. They lay the ground rules at the start of the conference and aren't shy about reminding them what they should and should not be doing during the mediation. . . Our training provides that the mediators set the seating up to ensure that parents and school are first and foremost."[82] Alaska's Director of Special Education also relies on mediators to balance the power during mediation.[83] Maine's Mediation Coordinator proposes that mediators inform all parties at the beginning of a session that they will enforce the "three strikes rule." He defines this as telling parties that interruptions and antagonism will not be tolerated during discussions. The first time this occurs the mediator will warn the offender. The second time this occurs there is warning and notice that the mediation will be terminated if the party continues to be antagonistic. Upon the third incident, the mediation is recessed or terminated. If recessed, the parties may be told to take 10 minutes, an hour or a day and come back ready to be respectful. If terminated, the parties are advised that they may proceed to a hearing or file another request for mediation when they are ready to be respectful.[84]

Parents can also be trained to advocate for themselves and one another in mediation. The National Council on Disability recommends "self-advocacy training programs for students with disabilities and their parents focused on civil rights awareness, education and secondary transition services planning, and independent living in the community."[85] Pennsylvania's Mediation Director explains that her state has excluded attorneys from mediation since 1988.[86] Non-attorney advocates play a significant role in the mediation system and often accompany parents to these forums. The Pennsylvania advocacy community strongly supports the exclusion of attorneys, maintaining that parents who have children with disabilities can be trained to be effective representatives for other parents. Since these advocates are also consumers of services, they are genuinely interested in ensuring that services are of the highest possible quality for all children.

Ohio also has a strong parent advocacy system. Under the direction of the state education agency and the Parent Training and Information Center (PTI), advocates receive extensive and continuing training in mediation and the provisions of IDEA. They assist parents prior to mediation by helping them define the issues in dispute and develop reasonable expectations from the school district. The statewide Parent Training Coordinator for the Ohio PTI, Ohio Coalition for the Education of Children with Disabilities (OCECD), emphasizes the importance of focusing parent advocates on the concerns of the families they represent.[87] The coordinator explains that some parent advocates are unable to separate their feelings from their own experience from the interests of their clients. In such situations, the coordinator assists the advocate, removing her from this role if necessary.

In addition to using parent advocates, Ohio provides proactive assistance to families through parent mentors. Mentors serve as sources of information and support to assist families and school districts in determining appropriate expectations for the delivery of special education services. With its system of parent mentors, parent advocates, and mediators, Ohio has held few due process hearings, and mediation is generally considered successful by stakeholders.

Parent advocates, as consumers of special education services, share a genuine interest in guaranteeing that services are of the highest possible quality for all children. There are critics of parent advocates, however, who question whether these individuals are engaging in the unauthorized practice of law.[88]

AREAS OF AGREEMENT

The issue of attorney and advocate participation in mediation is often an exercise in the reinforcement of preconceived beliefs. Those who endorse attorney participation generally maintain that school districts have a formidable advantage over parents. The attorney is seen as the protector of the child. Her role is to interpret complex regulations for parents and advocate aggressively, or at least assertively, on the child's behalf. School districts are perceived as inherently antagonistic toward providing students with disabilities the services required to meet their educational needs. Those who propose exclusion of attorneys view lawyers as obstreperous and obstructionist. They are seen as subscribing to the value of confrontation as an end in itself. Rather than engaging in consensus-oriented problem-solving activities, attorneys are perceived as dedicated to securing victories for their clients, hefty fees for themselves, and losses for their opponents without regard for the costs of such an approach. Observers of mediations can cite examples that support both stereotypes. In spite of the foregoing, supports and critics of an active role for attorneys and advocates in mediation have certain interests in common. Both sides of the debate agree that participants should enter mediation capable of understanding their rights and interests. They also concur that mediations should foster a fair, candid, and respectful dialogue during the incipient stages of a dispute. Once there is focus on these areas of agreement, the question of who should participate in mediation becomes eclipsed by the issue of how individuals should participate in mediation.

The central challenge then is to create a system that affords respect to all participants, provides families and schools with the skills and information necessary to engage effectively in the mediation process, and focuses on the educational needs of the children. When stakeholders are able to construct a system with agreement on the values, principles, and expected behavior of all stakeholders during mediation sessions, they foster an atmosphere that can lead to collaborative decision making. If, however, mediation is used as a ploy to camouflage inadequate

services or as a mechanism to gather information for use in due process hearings or litigation, then there is perpetuation of distrust.

A handful of states have viewed the construction of a mediation system as an opportunity to create a statewide culture that emphasizes the infusion of effective conflict management strategies into all phases of disputes. These states have focused on intervening in disputes earlier by offering training in interest-based negotiation to direct service providers before due process hearings or mediations are requested. With the goal of resolving many conflicts at the school level, they have devised mechanisms to swiftly bring concerns back to schools when parents contact state mediation offices. Communication training and summit meetings have been held among groups that have had a history of collective suspicion. Formal and informal agreements have been negotiated among formerly hostile groups as to how each entity pledges to engage other entities during IEP meetings and conflict resolution sessions. The goal is to replace polarization with partnership.

These states have employed innovative practices that speak to the interests shared by both sides of the debate. By examining how some states successfully satisfy the interests of both the defenders and detractors of including attorneys and advocates, other states may be able to set up new ways to resolve conflicts.

AGREED: Each Side Should Enter Mediation Capable of Understanding and Representing its Rights and Interests.

Innovative Practice:

Development of Stakeholder's Council in Wisconsin. When Eva Soeka, a Marquette University law school professor, assumed directorship of the Wisconsin Special Education Mediation System in 1998, she encountered a fragmented process that was characterized by distrust among all parties. There were a high number of hearings with little emphasis on informal resolution of conflict. She established a Stakeholder's Council, which includes representatives of school districts, parents, parent advocates, and attorneys. The Council has defined the training needs of all sectors and has established comprehensive training forums throughout the state. While most states provide continuing education for mediators, Soeka maintains that there must be buy-in among all participants in the mediation process on the expectations of mediation and the manner in which participants should approach the process. Ongoing training can alter the adversarial mindset. She strongly believes that attorneys should be involved in the mediation system since exclusion of any one segment can undermine the creation of system reform. She is particularly concerned that exclusion of attorneys will encourage them to advise parents to seek more litigious alternatives, thus undermining the value of mediation. She reports a 79% agreement rate in the first year of her management of the system with an even higher rate in 1999. She also reports high rates of parental satisfaction with mediation.

Innovative Practice:

Intensive Stakeholder Training in Idaho. Prior to 1998, the Idaho State Education Agency and local school districts rarely interfaced with the state's two main advocacy organizations, Idaho Parents Unlimited (IPUL) and Comprehensive Advocacy, Inc. Larry Streeter, Dispute Resolution Specialist for the Idaho Department of Education,

brought the principal representatives of these entities together for a 40-hour training in interest-based negotiation by Canadian mediation expert Stacey Holloway. Thirty-seven people attended a five-day workshop. The content of the course as well as the opportunity to share perspectives transformed the frosty climate that had existed between the educational establishment and the advocacy community. There is now frequent interaction and collaboration.

A common mindset has developed on the process, style, and importance of collective decision making. Extensive follow-up training is now being offered in school districts throughout the state so that the harmonious relationships that have been cultivated at the state level will also occur at the school district level. The authors recommend that states consider a voluntary endorsement that could be granted to attorneys and advocates. Such an endorsement would indicate that they have taken mediation training and pledge to use interest-based negotiation strategies in their representation of children in special education mediation.

Innovative Practice:

Ensuring Stakeholder Investment Through Privatization of the Mediation Office in The State of Washington. Sound Options Group, L.L.C., assumed management of the Washington mediation system in 1994 when it won this contract in response to a Request for Proposals (RFP) from the Washington Office of the Superintendent of Public Instruction (WOSPI). The privatization of the mediation process was part of an effort by the state to bring stakeholders together and encourage the perception that all parties to disputes are part of a process that is overseen by an entity that does not have ties to any specific stakeholder group. Reacting to the conviction by advocates that a mediation system controlled by the educational establishment cannot be completely objective, the WOSPI transferred responsibility for the implementation of the mediation system to this firm. Greg Abell, Director of Sound Options, reports that the credibility of the statewide mediation system has been enhanced. He and his colleagues are seen as advocates for children who are able to balance the interests of all parties in their dispute resolution training and management of the mediation system.

Innovative Practice:

Ensuring Effectiveness of the Evaluation Process in California. Evaluations of the mediation process are generally administered immediately following the completion of a case and reflect satisfaction with mediation sessions rather than assessment of whether promised changes have occurred, according to the California Mediation Director Sam Neutstadt. He recommends that states focus on the durability of the Agreement by surveying all parties six months following the completion of a mediation to determine if agreements have been effectively implemented. He emphasizes that it is important to analyze how many refilings occur on the original issue in dispute at some point after the mediation has been completed.

AGREED: Mediation Should Foster a Fair, Candid, and Respectful Dialogue During the Incipient Stages of a Dispute.

Innovative Practice:

Resolving Disputes as Early as Possible Through the Use of Ombudspeople in Pennsylvania. Grace D'Alo, Director of Special Education Mediation Services for Pennsylvania, maintains that many areas of conflict between school representatives and parents are the result of communication breakdowns. She has created an 800 number that can be utilized by families who are contemplating a mediation or hearing. Similar to a program that

was implemented in the early 1990s in Ohio by the Ohio Legal Rights Service, an ombudsperson helps to facilitate the complaint while also providing the family with information and resources. Conversations between the family and ombudspeople are actually a form of early dispute resolution since issues can be clarified and direction provided to the family. The ombudsperson offers to immediately contact school officials when parents have grievances. Frequently, the grievances are resolved without parents ever having to file for formal mediation. Sometimes the ombudsperson counsels parents that their requests are not within the scope of the entitlement and need to be brought to another forum. They can link families to other agencies in the community to meet the non-IDEA needs of children. D'Alo is seeking to build layers of dispute resolution: from teleconferencing to mediations to hearings. She strongly believes that many of the issues can be resolved at the teleconferencing level.

Innovative Practice:

Utilization of Ongoing Technical Assistance by a Central Entity as is Done in The Americans With Disabilities Act (ADA) Mediation Project. The provision of ongoing technical assistance to mediators involved in the resolution of ADA disputes is central to the success of conflict resolution, according to Peter Maida, Director of the Key Bridge Foundation in Washington, DC. He oversees the implementation of the mediation process for the Americans with Disabilities Act under a contract with the Department of Justice. ADA mediations are requested through the Foundation and assigned to mediators who have been trained by Foundation staff. Although familiar with ADA law, mediators may also rely upon the Foundation for technical assistance. Maida and his colleagues are available to provide telephone consultation to all parties involved in an ADA dispute: the mediator, the lawyer for the plaintiff, or the lawyer for the respondent. They essentially serve as ombudspeople for all stakeholders in the system. They can be intermediaries before, during, and after the mediation takes place. Mediation is conceptualized not as an event, but as an ongoing process.

A COMMON CONCERN: ATTORNEYS' FEES

The award of attorneys' fees is a concern for both proponents and opponents of attorney involvement in special education mediation. If attorneys are compensated for work done in mediation, then they may be more apt to promote mediation and seek a more active role in it. Attorneys not paid for representing their clients in mediation may choose not to participate in mediation and instead may advise families to seek other methods for resolving disputes. Thus, the issue of awarding attorneys' fees for services performed in mediation affects the scope of this debate.

The IDEA grants reasonable attorneys' fees to parents who are the "prevailing party" in an "action or proceeding" brought under IDEA.[89] Thus, whether a court may award attorneys' fees for work done in mediation depends upon whether the mediation is an action proceeding under IDEA and whether the parents can be a prevailing party in mediation.

A mediation has been considered by some courts to be an action or proceeding eligible for attorneys' fees under the IDEA.[90] This position is supported by cases that have permitted attorneys' fees for cases settled before due process.[91] An important issue remains, however, as to whether attorneys' fees may be granted for mediations that are conducted before a due process hearing is requested. The 1997 amendments to the IDEA address this issue and explain that attorneys' fees may be awarded at the discretion of the State for a mediation that is conducted prior to the filing of a complaint.[92] If attorneys are only paid for their services after due process has been requested,

then they will have no incentive to resolve disputes through mediation before a claim is filed.[93]

A more contested issue concerning the awarding of attorney fees for mediation is whether parents may be considered a "prevailing party" in a successful mediation. A prevailing party under IDEA "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."[94] The United States Supreme Court has further explained that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties...in a way that directly benefits the plaintiffs."[95] In short, parents are prevailing parties when they achieve "more than purely technical or de minimis" success.[96]

It is not yet conclusive that parents who settle their claims in mediation are indeed prevailing parties.[97] While two district courts have found that parents who mediate their disputes are prevailing parties under the statute,[98] the question has yet to be answered definitively by the appellate courts.[99] Part of the problem in establishing that parents prevail during mediation is demonstrating evidence of an actual dispute prompting mediation.[100] When parents engage a system of early dispute resolution, they may not have acquired sufficient evidence to prove the existence of a dispute that warrants attorneys' fees under IDEA. Ironically, parents who succeed early in mediation may therefore lose out on attorneys' fees, unless the fees have been included in the mediated agreement.

Different views exist for operating under the legal uncertainty of attorney fee awards for mediation. In California, mediation is considered part of the hearing request process so that attorneys' fees may be awarded if a prevailing party emerges from mediation.[101] Advocates for granting attorneys' fees for successfully mediated disputes in Alabama argue that attorneys participating in mediation may serve as a catalyst for changing educational services and therefore are entitled to compensation.[102] Opponents of granting attorneys' fees contend that mediators cannot impose judgments and lack the authority to alter the legal relationship between parents and school districts so as to make one party prevail over another.[103] By awarding attorneys' fees for work done to create an agreement that alters the legal relationship of the parties, the courts may sanction non-lawyer mediators in the unauthorized practice of law[104] and lawyer-mediators in the unethical practice of law.[105]

The National Council on Disability (NCD) recommends federal funding to provide free and subsidized legal services for parents of children with disabilities.[106] Specifically, the NCD Report suggests that 10% of the total of any Part B increase be used "to fund free or low cost legal advocacy services to students with disabilities through public and private legal service providers."[107] While not an answer to the question concerning the appropriate compensation for attorneys participating in mediation, the concept of free and reduced legal services offers a strategy for lowering the barriers to representation in special education.

CONCLUSIONS

The purpose of this briefing paper is to "mediate" the dispute between the proponents and opponents of permitting attorneys and advocates to participate in mediating special education conflicts. Both sides of the debate present persuasive arguments to support their positions. Supporters for including attorneys and advocates argue that these representatives help to balance power between parents and school districts and also offer important contributions to the mediation process. Critics contend that attorneys and advocates threaten to transform collaborative mediations into contentious forums. Moreover, they claim counsel are not necessary to balance power between parents and school districts in a mediation. Each side can cite myriad examples to promote its position.

The two parties share common interests and concerns and reveal similar interests. Proponents and opponents of attorney and advocate participation agree that parties to mediation should be able to understand and represent their rights and interests. They also believe that mediation should foster a fair, candid, and respectful dialogue, which should occur during the early stages of a dispute. Additionally, both sides consider the awarding of attorneys' fees for representation an important and legally indeterminate issue.

It is essential to explore the many important roles attorneys may play before, during, and after mediation. At a minimum, attorneys may have a duty to advise their clients about alternative dispute resolution, currently a professional requirement in some states. Attorneys, even if not involved in the mediation, may act as pre-mediation advisers by explaining the mediation process, the role of the mediator, and the rights and responsibilities of the parties involved in the mediation. If they participate in mediation, attorneys could be silent advisors who listen and counsel as needed or a partner who helps their client present information or take on a specialized role. They may also actively represent their client in mediation when their clients are incapable of representing their own interests effectively. Finally, attorneys may provide counsel after mediation by monitoring implementation of agreements or, if mediation has failed, preparing a case for further settlement or due process.

Rather than focusing on the inclusion or exclusion of attorneys and advocates in special education mediation, states are advised to reframe the issues in order to examine their present conflict resolution systems. Innovative practices in several states demonstrate that common interests can point the way to reach workable agreements. By constructing respectful conflict resolution systems that include training for families, school districts, service providers, attorneys, and advocates, and by placing the primary emphasis on the educational needs of children, states may no longer need to debate the question of whether to include attorneys and advocates in mediation.

APPENDIX A:

20 U.S.C. Subchapter 1415: Procedural Safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures: The procedures required by this section shall include—

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change; the identification, evaluation, or educational placement of the child, in accordance with subsection (c) of this section, or the provision of a free appropriate public education to the child;

(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

(5) an opportunity for mediation in accordance with subsection (e) of this section;

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)—

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include—

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) Content of prior written notice

The notice required by subsection (b)(3) of this section shall include—

(1) a description of the action proposed or refused by the agency;

(2) an explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter.

(d) Procedural safeguards notice

(1) In general

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum—

(A) upon initial referral for evaluation;

(B) upon each notification of an individual education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6) of this section.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that State);

(L) Civil actions; and

(M) Attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) of this section to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k) of this section.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f) of this section, or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1482 or 1483 of this title; or

(ii) an appropriate alternative dispute resolution entity; to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) Impartial due process hearing

(1) In general

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) Disclosure of evaluations and recommendations

(A) In general

At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitation on conduct of hearing

A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

(g) Appeal

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regarding to the amount in controversy.

(B) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regarding to the amount in controversy.

(B) Award of attorneys' fees

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is a prevailing party.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7) of this section; the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

APPENDIX B:

Excerpt from Report of the Committee on Education and the Workforce of the United States House of Representatives on HR 5

May 13, 1997

To encourage early resolution of problems whenever possible, section 615 requires States to offer mediation as a voluntary option to parents and LEAs as an initial process for resolving disputes. However, the bill requires that a State's mediation system may not be used to delay or deny a parent's right to due process. The bill allows SEAs and LEAs to establish procedures to require parents who choose not to engage in mediation to meet, at a time and place convenient for them, with a disinterested party who would encourage and explain the benefits of mediation. This individual would be under contract with either a Parent Training and Information Center funded under Part D or an alternative dispute resolution entity.

The Committee believes that, in States where mediation is now offered, mediation is proving successful both with and without the use of attorneys. Thus, the Committee wishes to respect the individual State procedures with regard to attorney use in mediation, and therefore, neither requires nor prohibits the use of attorneys in mediation. The Committee is aware that, in States where mediation is being used, litigation has been reduced, and parents and schools have resolved their differences amicably, making decisions with the child's best interest in mind. It is the Committee's strong preference that mediation become the norm for resolving disputes under IDEA. The Committee believes that the availability of mediation will ensure that far fewer conflicts will proceed to the next procedural steps, formal due process and litigation, outcomes that the Committee believes should be avoided when possible. Section 815(e)(2)(B) of the bill provides that the State shall maintain a list of individuals who are qualified mediators. The Committee intends that, whenever such a mediator is not selected on a random basis from that list, both the parents and the agency are involved in selecting the mediator, and are in agreement with the individual who is selected. The Committee further intends that any individual who serves as an impartial mediator under Part B of IDEA is not an employee of any local education agency or State agency described in section 613(h), and is not a person having a personal or professional conflict of interest. The Committee believes that the mediators be experienced, trained, and understand the law, the Committee clearly does not intend that all mediators be attorneys. Section 615 also specifies that a State will bear the cost of mediation.

The legislation requires that agreements reached in mediation shall be put in writing. Furthermore, the amendments require that discussions held in mediation would be confidential and could not be used as evidence in any subsequent due process hearing or civil action. However, the Committee intends that nothing in this bill shall supersede any parental access rights under the Family Educational Rights and Privacy Act of 1974 or foreclose access to information otherwise available to the parties. Mediation parties may enter into a confidentiality pledge or agreement prior to the commencement of mediation. An example of such an agreement follows:

The mediator, the parties, and their attorneys agree that they are all strictly prohibited from revealing to anyone, including a judge, administrative hearing officer or arbitrator the content of any discussions which take place during the mediation process. This includes statements made, settlement proposals made or rejected, evaluations regarding the parties, their good faith, and the reasons a resolution was not achieved, if that be the case. This does not prohibit the parties from discussing information, on a need-to-know basis, with appropriate staff, professional advisors, and witnesses.

The parties and their attorneys agree that they will not at any time, before, during, or after mediation, call the mediator or anyone associated with the mediator as a witness in any judicial, administrative, or arbitration proceeding concerning their dispute.

The parties and their attorneys agree not to subpoena or demand the production of any records, notes, work product, or the like of mediator in any judicial, administrative, or arbitration proceeding concerning this dispute.

If, at a later time, either party decides to subpoena the mediator or the mediator's records, the mediator will move to quash the subpoena. The party making the demand agrees to reimburse the mediator for all expenses incurred, including attorney fees plus mediator's then-current hourly rate for all time taken by the matter.

The exception to the above is that this agreement to mediate and any written agreement made and signed by the parties as a result of mediation may be used in any relevant proceeding, unless the parties agree in writing not to do so. Information which would otherwise be subject to discovery, shall not become exempt from discovery by virtue of it being disclosed during mediation.

APPENDIX C:

Regulatory Provision for Mediation Under IDEA 97 (34CFR § 300.506)(March 12, 1999)

Main Regulatory Provision
for Mediation Under IDEA 97

Sec. 300.506 Mediation.

(a) General. Each public agency shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in Sec. 300.503(a)(1) to resolve the disputes through a mediation process that, at a minimum, must be available whenever a hearing is requested under Secs. 300.507 or 300.520-300.528.

(b) Requirements. The procedures must meet the following requirements:

(1) The procedures must ensure that the mediation process- (i) Is voluntary on the part of the parties; (ii) Is not used to deny or delay a parent s right to a due process hearing under Sec. 300.507, or to deny any other rights afforded under Part B of the Act; and (iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(2)(i) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. (ii) If a mediator is not selected on a random (e.g., a rotation) basis from the list described in paragraph (b)(2)(i) of this section, both parties must be involved in selecting the mediator and agree with the selection of the individual who will mediate.

(3) The State shall bear the cost of the mediation process, including the costs of meetings described in paragraph (d) of this section.

(4) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(5) An agreement reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement.

(6) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings, and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process.

(c) Impartiality of mediator.

(1) An individual who serves as a mediator under this part--(i) May not be an employee of- (A) Any LEA or any State agency described under Sec. 300.194; or (B) An SEA that is providing direct services to a child who is the subject of the mediation process; and (ii) Must not have a personal or professional conflict of interest.

(2) A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency described under Sec. 300.194 solely because he or she is paid by the agency to serve as a mediator.

(d) Meeting to encourage mediation.

(1) A public agency may establish procedures to require parents who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party--(i) Who is under contract with a parent training and information center or community parent resource center in the State established under section 682 or 683 of the Act, or an appropriate alternative dispute resolution entity and (ii) Who would explain the benefits of the mediation process, and encourage the parents to use the process.

(2) A public agency may not deny or delay a parent's right to a due process hearing under Sec. 300.507 if the parent fails to participate in the meeting described in paragraph (d)(1) of this section.

(Authority: 20 U.S.C. 1415(e))

ENDNOTES

[1] *Years of Promise: A Comprehensive Learning Strategy for America's Children.* Carnegie Corporation, New York: (1996).

[2] See L. M. Traub, The Individuals with Disabilities Education Act: A free appropriate public education—at what cost? *22 Hamline L.Rev.* 663, 667 (1999).

[3] Feinberg, E. and Beyer, J. Creating public policy in a climate of clinical indeterminacy: Lovaas as the case example du jour. *Infants and Young Children.* 10, 8 (January 1998).

[4] Personal interview with state dispute resolution coordinator on September 23, 1999 in Baltimore, Maryland.

[5] Crowley, C., Smith, A. and David, T. Illinois mediation model assuages special education disputes. *Proceedings of the Forum of the National Institute for Dispute Resolution.* (Spring 1991).

[6] Zirkel, P.A. Overdue process revisions for the Individuals with Disabilities Education Act. *Montana Law Review*, Vol. 42, (April 1994).

[7] See Engel, D. Law, culture, and children with disabilities: Educational rights and the construction of differences. *Duke Law Journal.* 168, 179 (1991).

[8] Personal correspondence on October 28, 1999.

[9] Gittler, J. and Hurth, J. Conflict management in early intervention: Problem-solving negotiation. *Infants and Young Children.* 11,1, (July 1998).

[10] Schrag, J. Mediation and other alternative dispute resolution procedures in special education. Final Report Year 4 Deliverable under Contract Number HS92015001, Project FORUM. Prepared for the Office of Special Education Programs by the National Associate of State Directors of Special Education, (1996).

[11] Ahearn, E. *Mediation and Due Process Procedures in Special Education: An Analysis of State Policies* Prepared by the National Association of State Directors of Special Education, (1994).

[12] Schrag, J. and Ahearn, E. Continuum of options and the national experience. *NCHCY News Digest*, Academy for Educational Development, (1996).

[13] Gittler, J. and Hurth, J. Conflict management in early intervention: Procedural safeguards and mediation. *Infants and Young Children.* 11, 1, (July 1998).

[14] Kleiner, C. The action out of court: Programs in alternative dispute resolution are on the rise. *U.S. News and World Report.* (March 29, 1999).

[15] Currie, C.M. Mediation and medical practice disputes. *Mediation Quarterly.* 15, 3, (Spring 1998).

[16] McEwen, C., Rogers, N., and Maiman, R. Bring in the lawyers: Challenging the dominant approaches to ensuring fairness in divorce mediation. *79 Minn.L.Rev.* 1317.

[17] Unpublished hand-outs provided by the National Association of Mediation in Education (NAME).

[18] See *The Nineteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act.* Section III. U.S. Department of Education, Washington, D.C. (1997).

[1]See, for example, the 1999 publication to members from the Teachers Association of Anne Arundel County, Maryland.

[2]Sabatino, J. ADR as litigation lite: Procedural and evidentiary norms embedded with Alternative Dispute Resolution. From Mediation Information Resource Center, (1999).

[3]Baldridge, S. and Doty, D. Mediation under the new IDEA: Room to be reasonable. Individuals with Disabilities Education Law Report #19, LRP Publications, (1998).

[4]Engiles, A., Baxter Quash-Mah, S., Peter, M. and Todis, B. Utilization of dispute resolution for special education disagreements. Unpublished paper. Eugene, Oregon, (1995).

[5]Boundy, K. and Antonucci, R. When parents and educators do not agree: Using mediation to resolve conflicts about special education. Center for Law and Education, Boston, Massachusetts, (1995).

[6]Opuda, M., Parental perception of the fairness of due process in special education. University of Maine. Unpublished dissertation. March (1999).

[7]See The Report of the U.S. House Committee on Education and the Workforce, May 13, 1997. (Partially excerpted in Appendix A of this briefing paper).

[8]Telephone interview on October 27, 1999.

[9]Personal interview on November 22, 1999 in Washington, D.C.

[10]Beyer, J. Practicing law at the margins: Surveying ethics rules for legal assistants and lawyers who mediate. *The Georgetown Journal of Legal Ethics*. XI, 2, Winter (1998).

[11]Kovach, K. Lawyers ethics in mediation: Time for a requirement of good faith. *Dispute Resolution Magazine*. Vol. 1, No. 2, Winter (1997).

[12]Goldberg, S. and Huefner, D. Dispute resolution in special education: An introduction to litigation alternatives. 99 *Ed. Law Rep.* 703.

[13]Mastrofski, J. Power imbalance within the setting of special education mediation: A view toward structural and organizational factors influencing outcome. Sociological Practice, (1992).

[14]Personal correspondence on October 28, 1999.

[15]Written correspondence on November 5, 1999.

[16]Personal interview on November 22, 1999 in Washington, D.C.

[17]Opuda, M. *Op. Cit.*

[18]Kurilof, P. and Goldberg, S. Is mediation a fair way to resolve special education disputes: First empirical findings. *Harvard Negotiation Law Review*. 2. (Spring 1997).

[19]Gittler, J. and Hurth, J. Conflict management in early intervention: Problem-solving negotiation. *Op Cit.*

[20]Schrag, J. *Op. Cit.*

[21]Mnookin, R. Why negotiations fail: An exploration of barriers to the resolution of conflict. *Ohio State Journal of Dispute Resolution*. 8, 235, 1993.

[7]Engel, D. Law, culture, and children with disabilities: Educational rights and the construction of difference. *Duke Law Journal*, 168, (1991).

[8]Mastrofski, J. *Op. Cit.*

[9]Kuriloff, P. Is justice being served by due process? Law and Contemporary Problems. 48, 9, (1995).

[10]Schrag, J., *Op. Cit.*

[11]Telephone interview on September 29, 1999.

[12]Telephone interview on October 23, 1999.

[13]Telephone interview on December 29, 1999.

[14]Telephone interview on October 27, 1999.

[15]Electronic correspondence on December 23, 1999.

[16]Gordon, Why attorneys support mandatory mediation. *Judicature*, (March/April 1999).

[17]Lande, J. Lawyers' routine participation directs shape of litimediation. *Alternatives to High Cost Litigation*, (April 1998).

[18]Telephone interview on November 5, 1999.

[19]Personal correspondence on October 28, 1999.

[20]Electronic correspondence on October 15, 1999.

[21]Telephone interview on October 20, 1999.

[22]Personal interview on September 25, 1999 in Baltimore, Maryland.

[23]Telephone interview on October 13, 1999.

[24]Electronic correspondence on October 15, 1999.

[25]Mosten, F. Unbundled legal services in mediation. *ADR Report*. Vol. 3, No. 24, (November 24, 1999).

[26]Information from Western Regional Resource Center, October 1999.

[27]Electronic correspondence from Maine Due Process Coordinator, December 23, 1999. Also, *The Washington Post*, (February 19, 1997).

[28]Director of Special Education for the Alaska Department of Education, citing policy handbook, during telephone interview on October 23, 1999.

[29]Dispute Resolution Specialist for the Idaho Department of Education, citing policy handbook, during telephone interview on October 24, 1999.

[30]Telephone interview with on October 19, 1999.

[1]Spier, R. Mediation miscues: Ten biggest mistakes lawyers make in mediation. *Oregon State Bar Bulletin*. (June 1999).

[2]Telephone interview on December 21, 1999.

[3]Nolan-Haley, J. Lawyers, clients and mediation. *Notre Dame L.Rev.* 73, 1369, (May-July 1998).

[4]Stallworth, L. Finding a place for non-lawyer representation in mediation. *Dispute Resolution Magazine*. 4, 2, (June 1999).

[5]From the on-line *Wrightslaw Special Education Newsletter*. (November 30, 1999).

[6]See Riskin, L. Understanding mediators' orientations, strategies, and techniques. *Harv. Negotiation L. Rev.* 7, 8 (1996).

[7]Opuda, M. *Op. Cit.*

[8]Lyn Beekman, hand-out for presentation on ADR options, 1998.

[9]Lande, J. *Op Cit.*

[10]Telephone interview on October 19, 1999.

[11]Riskin, L., *Op. Cit.* (categorizing and describing the styles of mediators in part as evaluative and facilitative).

[12]See Hughes, S. Elizabeth's story: Exploring power imbalances in divorce mediation. *Geo. J. legal Ethics*. 8, 553, 592 (1995).

[13]Academics debate, however, whether evaluative mediators practice law. See Menkel-Meadow, C. Is mediation the practice of law? *Alternatives to High Cost of Litig.* 14, 57 (1996).

[14]See Riskin, L., *Op. Cit.*

[15]Baldridge, S. and Doty, D. *Op. Cit.*

[16]Baldridge, S. and Doty, D. *Op. Cit.*

[17]Gittler, J. and Hurth, J. Conflict management in early intervention: Problem-solving negotiation. *Op Cit.*

[18]Electronic correspondence on October 15, 1999.

[19]Electronic correspondence on October 28, 1999.

[20]Telephone interview on October 23, 1999.

[21]Electronic correspondence on December 23, 1999.

[22]National Council on Disability, IDEA Compliance Report, Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind (January 25, 2000).

[23]Personal interview on September 26, 1999 in Baltimore, Maryland.

[24]Telephone interview on January 4, 2000.

[25]Menkel-Meadow, C. *Op. Cit.*

[77] 20 U.S.C. 1415(i)(3)(B).

[78] See *E.M. v. Millville Bd. Of Educ.*, 849 F. Supp.312,314 (D.N.J. 1994) (finding mediation to be an action or proceeding under IDEA and citing authorities that permit parents to recover attorneys' fees in cases resolved through settlement); *Masotti v. Tustin Unified School Dist:*, 806 F. Supp. 221, 225 (C.D. Cal.1992) (awarding attorneys' fees to parents who mediated their conflict and did not proceed to due process).

[79] See *Masotti*, 806 F. Supp. at 224 (citing precedent that awarded attorneys' fees before a hearing occurred).

[80] 20 U.S.C. 1415(i)(3)(D)(ii).

[81] See Baldridge, S., and Doty, D. *Op Cit.*

[82] Phelan v. Bell, 8 F.3d 369,373 (6thCir.1993) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

[83] *Farrar v. Hobby*, 506 U.S.103, 111-12 (1992).

[84] *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489U.S.782,792 (1989).

[85] See Baldridge, S. and Doty, D. *Op. Cit.* (citing cases that cast doubt on district court rulings that find parents who mediate a prevailing party).

[86] See *Millville Bd. Of Ed.*, 849 F. Supp. at 317; *Masotti*, 806 at 225. Cf. *Ind. School Dist. No.432 v. J.H.*, 8 F. Supp.2d.1166, 1176 (D.Minn.1998) (denying attorneys' fees for parents who resolved their dispute but neverthless proceeded to a due process hearing).

[87] The Third Circuit has held that parents were not prevailing parties in a mediation that produced an agreement whereby the school district agreed to pay the costs of private school tuition. See *D.R. v. East Brunswick Bd. Of Educ.*, 109F.3d 896, 902(3rd Cir.1997).

[88] See *Kletzman v. Capistrano Unified School Dist.*,91 F.3d 68,71 (9th Cir.1996) (holding that parents failed to demonstrate a dispute when the school district agreed to their request after two IEP meetings).

[89] Neustadt, S. *Op. Cit.*

[90] Mattison, D. *Op. Cit.*

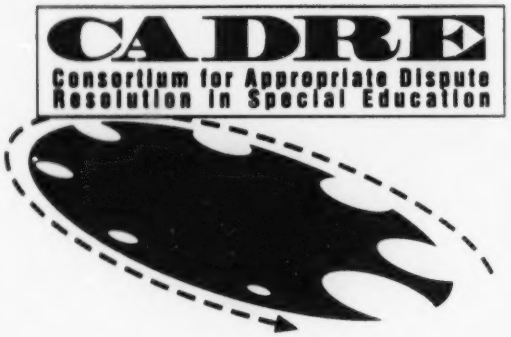
[91] Baldridge, S. and Doty, D. *Op. Cit.*

[92] Menkel-Meadow, C. *Op. Cit.*

[93] Beyer, J. Practicing law at the margins: Surveying ethics rules for legal assistants and lawyers who mediate, 11 *Geo. J Legal Ethics* 411 (1998) (examining the rules of ethics governing lawyers who mediate).

[94] National Council on Disability, IDEA Compliance Report, *Op. Cit.*

[95] *Id.*



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CADRE uses advanced communications technology and traditional strategies to:

- *Provide technical assistance on implementation of the mediation requirements under IDEA '97.*
- *Motivate parents, schools, and service providers to use appropriate dispute resolution processes.*
- *Stimulate and support efforts to resolve disputes early and effectively.*